b) prevent the Petitioner from recalling the government's key witness;

c) refuse to order the government to provide the Petitioner with even a copy of the undisclosed and illegally seized evidence in spite of numerous requests during his trial, Rule 16, Rule 41(e), Jencks Act.

C. This appeal presents the novel and clearly substantial, let alone "debatable," constitutional issue: in raising a Sixth Amendment claim of ineffectiveness of counsel, what degree of prejudice, if any, must be shown when counsel, for personal reasons, secretly communicates with the court attacking his client, and submits to the court all of his confidential communications with his client?

D. This appeal presents the novel and clearly substantial, let alone "debatable," constitutional issue: once this complete breach of confidentiality and professional ethics occurs, what must the court do to mitigate the harm and ensure that the defendant nonetheless receives due process and a fair trial?

STATEMENT OF FACTS

Petitioner conducted his business from a commercial building he owned that was foreclosed upon by the bank while Mr. Hazlewood was moving his business into his home, but did not intend to abandon his business records. It was later learned that the bank's personnel were in contact with the FBI during this time period and had allowed it unfettered access for five weeks. Grand jury subpoenas were issued by the U.S. Attorney's office in 1993, though the Petitioner was not indicted until 1996. Petitioner's attorney's excellent documentary records of her efforts to access the building resulted in the prelimnary finding of a violation of Mr. Hazlewood's Fourth Amendment Rights. For five weeks, they perused attorney-client correspondence, medical records, essentially Petitioner's

entire life. The "investigation" at that time was for charges that the FBI never pursued and that vary between the government's accounts, not the investor fraud case that arose from that search and seizure. Yet in spite of their allegations of investor fraud, the record is silent as to create a receivership to discover and protect the legitimate drilling proceeds. Neither Mr. Hazlewood nor his lawyer were notified of the subpoenas or the search.

On March 20, 1997, Mr. Hazlewood was indicted on eight counts of mail fraud (18 U.S.C. § 1341, counts 1 - 8) and tax evasion (26 U.S.C. § 7201, counts 9 -11). Hon. Gary L. Taylor, presided over the proceedings and the petitioner was convicted on May 27, 1999.

On or about February 2, 1998, Mr. Hazlewood wrote to the District court asking to substitute in new counsel for his then court-appointed counsel, James L. Waltz. On February 3, 1998, unbeknownst to Mr. Hazlewood, his counsel filed under seal, deceptively hidden within a purported ex parte application for a continuance, a Declaration that attached all of counsel's attorney-client privileged communications with his client. In his Declaration, Mr. Waltz detailed the problems he was allegedly experiencing with Mr. Hazlewood, characterizing him as "very hostile and abusive."[1] (WD ¶ 5) Counsel's motivation for attacking his client and for disclosing clearly privileged information was strictly personal and entirely self-serving: he asserted that he was acting for his own protection against any counter claim of ineffectiveness or rebutting some forthcoming lawsuit or Bar complaint. (WD, ¶ 3) In Mr. Waltz's words:

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[1]The Waltz Declaration [WD, App E] and attached correspondence was submitted as Exhibit 7 of the MHCand as Exhibit 1 of the MCA.

> he "need[ed] to create some record vise vie [sic] any future 2255 motion or complain [sic] against counsel." (WD, ¶8)

Petitioner later heard the government attorney state that Waltz had promised the government that he would deliver a deal but the offer had expired, while Waltz was telling him that the government was unwilling to re-open its offer if any new motions were filed. As a final insult, Mr. Waltz concluded that Petitioner was a mental patient.

Earlier contact of Judge Taylor by Mr. Waltz would not be documented, and one must wonder how Mr. Waltz knew that his secret submission would have no repercussions on his legal and political aspirations, since any judge would report such an ex parte submission to the State Bar. Had an evidentiary hearing been held, Petitioner could have explored whether Waltz, whom Judge Taylor had appointed, had discussed his difficulties with Petitioner, particularly his inability to convince him to plead guilty without knowing the details of an illegal search, whether he created and submitted this documentation at the Judge's suggestion, and disclosed other details verbally to the Court or government counsel.

Neither counsel nor the court ever advised him that counsel breached the attorney-client privilege and this gross impropriety was not discovered until 2003, well after Mr. Hazlewood's conviction became final. This improperly-disclosed correspondence included information that was prejudicial to Mr. Hazlewood, including detailed discussions of defense strategies and witnesses, Mr. Waltz's observations on his client's guilt, personality, mental competency, and even counsel's negative comments on the merits of Mr. Hazlewood's very critical suppression motion.

Both the tone and the content of the correspondence and Mr. Waltz's Declaration were unquestionably prejudicial: through the correspondence, the trial Judge was im-

properly exposed to extrajudicial information adverse to Mr. Hazlewood. For example, in one letter, Mr. Waltz referred to a police report against Mr. Hazlewood filed by his ex-spouse; in another, he noted a complaint of theft filed by an old girlfriend; in yet another, Mr. Waltz mused about "commingl[ed] funds;" in another, whether Mr. Hazlewood was mentally ill and about the effect of his "gambling history" on this case.

Most devastating, Waltz shows his belief that Petitioner was guilty, his opinion on the merits of the suppression motion, and provided the theory by which the illegally seized evidence, and the entire case, the fruit of that poisonous tree, was admitted:

> For instance, did you divert partnership revenue and buy non-partnership assets or squander the money? The money trail says a lot. Follow the money.[2] Did you commingle funds. Did you use partnership money to pay for overhead?
>
> Your former CPA Tony Lam will be (reluctantly) the Government's star witness, along with many investors who lost lots of money.[3] Your own company checks will bury you. If you go to trial, you will lose and the amount of fraud loss will, likely, greatly exceed the Government's last offer. The effect: a substantial jump in your sentencing range. Even if you win your suppression motion, which is unlikely, copies of all the checks can be recovered from bank records. The Government's case will not be mortally wounded.

Waltz' attacks upon his client, most of which were used by the court, and some of which were found in the

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[2]These exact words were used by FBI agents, who would have been questioned about this at an evidentiary hearing.

[3]Waltz assumed this to be true without conducting any discovery or obtaining the assistance of an accountant.

government's case included, *inter alia*; that the motion for suppression of the illegal search would "end the case" and that there was a problem in obtaining discovery and revealed Tony Lam's reluctance to testify and suggested that the petitioner intended to obstruct justice:

> PLEASE do not call Tony Lam directly, in that he is a Government witness, but not by choice. In fact, wants very much to help you and refers to you as his brother. Still, I do not want any appearance that you are trying to influence Tony's testimony. When Tony does talk to you, it will be in my presence and that will be much more acceptable.[4]

He also stated that FBI agent Budman's admission that the office was not "abandoned," but appeared a viable working office, yet the Court allowed the government to argue abandonment to defeat the first suppression motion and knowing this would later be overcome, and suggested inevitable discovery.

Worse still, Mr. Waltz affirmatively deceived his client. Just a few days before he filed his Declaration, in a January 28th letter, Mr. Waltz had advised Mr. Hazlewood that he would be filing an ex parte application for a continuance and for the issuance of subpoenas. The Declaration was concealed within this ex parte application. Thus, when Mr. Hazlewood learned of the ex parte application, he had no reason to believe that it was accompanied by a Declaration attacking his character and furnishing the court with attorney-client privileged communications.

Mr. Waltz claimed in the Declaration that he was not trying to prejudice his client and was not asking to be

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[4]The implication is that Petitioner would obstruct justice if permitted to speak with Lam alone, but he never arranged such a meeting. At an evidentiary hearing, Waltz could have been questioned as to whether he shared Lam's comments with the government.

relieved. [WD, ¶¶ 3, 8] Yet, just a few days later, at a February 9, 1998 hearing, he volunteered that he should be relieved as counsel. In a stunning display of hypocrisy, Mr. Waltz asserted that he wanted "to make sure that [Mr. Hazlewood's] interests are placed over mine." He made this statement even though, just days earlier, to protect himself from a theoretical lawsuit or, even before trial and any verdict, from a theoretical post-conviction challenge to his effectiveness, he had already taken devastating and grossly unethical steps to place his own interests over his client's.

At the hearing, the court cryptically commented that "from the information I have, it appears to me that you [Mr. Hazlewood] are a difficult guy to work with" and questioned Petitioner's ethics, possibly referring to Waltz' instructions not to contact Lam, referred to Petitioner's need for "control," suggested but did "not recommend" pro se status. But the court did not advise Mr. Hazlewood that the "information he had" had come from defense counsel. The court ultimately agreed to appoint new counsel, but the Court's concealment of Waltz's betrayal of his client rendered the hearing was a meaningless formality.[5]

The trial court clearly considered the privileged correspondence in making rulings. But even if the court had not relied on this patently improper information in any specific ruling, once counsel had conveyed to the trial court his own terrible misgivings about his client, the court, understandably, could not view Mr. Hazlewood with the req-

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[5]In the aftermath and turmoil of Waltz' discharge, the ball was dropped in regards to re-scheduling the trial date that was taken off calendar at the time. Kenneth Reed, the next appointed attorney, proved perfect in that in his ineptitude he neglected to follow-up on this and, after the Petitioner refused to retroactively agree to a continuance, AUSA Kawahara "stipulated" to a continuance by signing Reed's name herself.

uisite judicial impartiality. The atmosphere had been poisoned. Yet the Judge did not advise Mr. Hazlewood of his counsel's betrayal so that he could make an informed choice as to whether to seek to recuse the Judge. Nor did the Judge sua sponte recuse himself. For whatever reason, the Judge kept the matter secret. The submission contained sufficient information about the illegal 1993 search for the Court to know of the serious problems facing the government and the only way to guarantee that he remain in his position and oversee the matter was to conceal the submission. Were Petitioner aware of it, he would certainly have sought recusal and his motion would have had merit. By concealing the submission to remain in place, Judge Taylor acted to insure that the government's wrongdoing would not result in dismissal of the indictment and once having done so, he could not transfer the case to another judge because he had gone too far.

Once having read the Waltz submission without taking remedial action, the District Court formed a predetermined mind-set that the Petitioner was guilty, and thus became a party to the violation of his rights.[6] The steps taken to assure Petitioner's conviction began with the Court's Order to brief inevitable discovery while claiming that the government had requested to do so:

> "The Government has requested that, if the Court is otherwise inclined to grant Defendant's motion, it wished to argue suppression is unwarranted under

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[6]Judge Taylor used the information to inter alia, denying bond after Probation recommended a $75,000 bond even though Petitioner had no prior record of violence or flight curtailing Petitioner's ability to assist in his defense, rejecting Petitioner's attorneys' motions to enforce discovery and Petitioner's initial request to substitute retained counsel, refusing to Order that his phone privileges be expanded during trial, and applying every sentencing enhancement sought, even abuse of trust that Probation stated did not apply.

> the doctrine of inevitable discovery. The Court grants that request."

[MHC, p. Dkt 145, App. C]. The docket reflects no government motion, no such request was ever made,[7] and the government has never asserted otherwise, in any responsive pleading to any of the voluminous briefs filed in the §2255 either at the District Court of Ninth Circuit, nor filed any evidence, such as a declaration, to support Judge Taylor's assertion. In response to Petitioner's arguments, the government cites Dkt 145, but has never alleged even in proffer that the Court's statement is true. Later, however, the government argued Independent Source without any request to include that doctrine, a doctrine whose inclusion was even more contorted than the application of inevitable discovery.

Petitioner's next attorney, Mr. Steering corrected court's mis-statement about the doctrine of inevitable discovery having been raised by the government rather than by the court itself, but failed to adequately preserve the issue:

> MR. STEERING: For the record, I don't remember the government ever raising the request that the government be allowed to brief or deal with the issue of inevitable discovery if the court was inclined to grant the motion to suppress that Mr. Hazlewood brought.
>
> THE COURT: I remembered as you were speaking that the reference to the last line was in my own memo in which I wanted to bring those points up.

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[7]The Court first suggested it on May 19, 1998, a few months after the Waltz submission: "[U]nder the doctrine of inevitable discovery, wouldn't the government have eventually gotten this stuff anyhow?" Appellant's counsel had briefed the issue, but the government never did so during the entire year that elapsed until the 3/23/99 Order. The second, 11/17/98 suggestion was removed from the record, but the Court did not deny making it when Appellant's counsel questioned the Court about it on March 29, 1999.

> And I can't remember whether the government said in their briefing that they wanted to do that or, in their communications to my staff at the time they were filing their papers, indicated that they wanted to raise that in the event that it came to that point. It might not have been raised in writing. It might have been raised to my staff saying that they would want to bring up that point.
>
> MR. STEERING: In fact, on November 17, 1998, at the end of the proceedings of the second day of the suppression hearing, you asked them to address that and they didn't.
>
> THE COURT: Okay. Does it matter?
>
> MR. STEERING: It matters to Mr. Hazlewood . . .

This Order was pivotal to the outcome of the case. The Court could not admit that the last minute injection of the inevitable discovery doctrine to admit the evidence came from Mr. Hazlewood's counsel. One day before the trial was scheduled to begin, the illegally obtained evidence was held by the District Court as admissible under the inevitable discovery doctrine that the court had ordered to be briefed.[8] The surprise admission of illegally seized evidence that no counsel had ever examined led to a conundrum that the Court took no action to remedy. M Steering was unprepared for trial and the petitioner proceeded to trial pro se.[9] The Petitioner could not know what was taken during the illegal search, could not use the seized documents in his defense.

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[8]This entire day's proceedings were provided as Appendix II of the MHC.

[9]The original §2255 was directed at Mr. Steering's error in not known F.R. Crim. Proc 11(a)(2) in the context of the failure of any of Petitioner's attorneys to advise him of the substantial increase in sentence that he would face if he did not plead gu ty. The Waltz filing was discovered by the habeas attorney while reviewing the record to brief those issues.

There was no hearing or determination during trial as to how each item of evidence was authenticated or under which doctrine it was deemed admissible. Instead, at the conclusion of the trial, Judge Taylor ruled that the items satisfied that exception to the hearsay rule and do qualify as business records under 803(6), and the Cunnane summaries were admitted under Rule 1006. [Vol. 4, p. 254, l. 5, p. 255, l. 1, App G]. The summary chart of gambling losses prepared by agent Hines, which also relied on illegally seized evidence were also admitted without authentication or determination of the origin of the various items of evidence. [Vol. 5, p. 25-26, App G]

Moreover, the court stated falsely that Rule 1006 had been complied with in that the underlying documents had been made available to the defense [Vol. 4, p. 256, l. 6-11, App. G]. At trial, the petitioner repeatedly begged the court to Order the government to provide him with at least copies of the illegally seized evidence, but the Court would not even Order that the investor files on the handful of investor witnesses be produced. These were brought into the courtroom from the US Attorney's office and never seen by Petitioner or his attorneys. Though several attorneys had been to the locker, none of them had ever looked at even the evidence that was there. Even Mr. Waltz did not claim that he looked inside the boxes of evidence. Rather, he declares that in his January 14, 1998, letter, "I also informed defendant that I had been to the FBI storage facility to review the many, many boxes and file cabinets of documents related to this case." (WD ¶ 31.) Nowhere does Mr. Waltz indicate that he ever actually examined the evidence.

There was no time other than at trial that this Pro Se Petitioner had a greater need for this evidence. The court knew that Waltz had never examined the evidence from the submission, and knew that Mr. Steering had never prepared for trial, and knew that the Petitioner, incarcer-

ated since his 1997 arrest, had never had any meaningful access to these documents.

The court denied Petitioner's requests to hold Lam overnight for cross-examination, knowing from the submission that Lam's cross-examination would have elicited truthful and exculpatory testimony. He was aware that the pro se Petitioner had a problem with Lam's testimony and should have assisted him by allowing him an evening to prepare his cross-examination. When Petitioner asked about this the next day, the Court accused him of "trying to induce error and make it appear that your rights are being violated" then states "[a]s I got to thinking about that last night," showing concern[10]. Lam could have been impeached with statements made to Steven Mitchell, Petitioner's tax advisor, of coercion by threats of deportation, criminal charges and loss of licenses, similar to Mitchell's testimony. In Mitchell's case, the Court permitted cross-examination far beyond the limited scope of direct examination, without requiring the government to re-call the witness as their own. The court again accused Mr. Hazlewood of attempting to induce error in the record,[11] which was devoid of any false or frivolous claim filed by

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[10]Additional instances of accusation of intentionally inducing error are found on [5/25, p. 25, l. 5-29, 5/26, p. 16, App G]

[11]. . . – it appears my fears were well-founded. What I'm concerned about is that you are trying to induce error and make it appear in the record that your rights are being violated. You've stated just now that the ruling of the court yesterday has put you at some sort of a disadvantage because you can't take the action you wanted.

Now, let' be very clear as to what the ruling was yesterday, and I'm going to make a finding that your rights are not, in my opinion and my observation, being violated here. [5/26, vol. 4, p. 16, l. 6-20, App G]

the petitioner, and stated falsely that he had asked Mr. Lam to stay for them to discuss this point before he left.[12]

Appeal, United States v. Hazlewood, 40 Fed. Appx. 347, 2002 U.S. App. LEXIS 6576 (9th Cir. Cal. 2002), reconsideration, and Certiorari, Hazlewood v. U.S., 537 U.S. 1057 (2002), were denied while petitioner was without knowledge of Waltz' submission.

The Motion suggested recusal but did not formally so move to give the Court the opportunity to act honorably by denying reading it, recusing, or asking another judge to look at the case to avoid the appearance of impropriety. After years of concealment of Waltz' transgression, Judge Taylor rejected the opportunity to invite scrutiny by an impartial jurist, but retained his control of this matter as a "member of team," confident that no higher Court would bring the matter to light. Even though the full extent of Judge Taylor's improper failure to recuse himself after reading the submission, even after the Petitioner raised the issue, was only made apparent by the Order of denial, the issue was squarely presented in the § 2255 motion:

> By submitting this package, Mr. Waltz placed the Court in a most difficult position that could only be fully cured by its recusal. Sadly, the Court may not even know how the information in this package prejudiced Petitioner.
>
> It prejudiced Petitioner by placing before the Court the very theory that allowed the introduction of the evidence that convicted him, that the government had not suggested [Dkt 268, tr. 5/10/99, p. 106, l. 7-25]. But if that alone can be overcome, there was other

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[12]Yesterday at the conclusion of his testimony when you asked that he be subject to recall, I asked him to stay so that we could discuss this point before he left. And after the jury was excused and before he left, I explained to you that yesterday was the time for you to cross-examine if you wanted to cross-examine him. [*Id.*]

prejudicial attorney client privileged and work-product information contained therein.

After the submission by Waltz and its concealment, the mindset of the court reveals his objective as his rulings and findings were all to the Petitioner's detriment and made without the careful consideration that the issues carried of deserved.

The October 18, 2004 denial without an evidentiary hearing did not address Petitioner's suggestion that the court should have recused after reading the submission [App. C], and was incomplete, inaccurate, and misleading in several respects. In regards to the Waltz submission, the court stated that, "Although Petitioner complains the Court raised the issue *sua sponte* based on the file information, the record reflects that the government's counsel first raised the issue. (See Criminal Docket #145) [App. C, p. 5-6]. The "record" referred to by the Court was his own March 29, 1999 Order, in which he made the same false statement, and had not denied that it was his own suggestion when confronted by Mr. Steering. The Court stated that "Petitioner has offered no evidence of Mr. Steerings claimed errors" in spite of having sent Mr. Steering to the disciplinary committee for his error, and the six (6) pages in the petition devoted to those errors, including the Court's own comments, and the Appended the entire May 19, 1999 transcript.

Notice of appeal was timely filed and the November 29, 2005 denial of the COA stated "[t]here has been no substantial showing of the denial of a constitutional right." [App C]

Exhaustive research failed to reveal a single case where an attorney so egregiously breached his duty to a client, moreover, where a Court kept such an ex parte submission secret from the defendant. Petitioner supported his Motion with declarations from nine legal scholars and attor-

neys [App. F][13] that demonstrate that Waltz submission was outside the "norms" of defense counsel practice. If the matter was not "fairly debatable" it was because nobody could reasonably argue that this submission did not prejudice the Petitioner, not the contrary.

> [T]he fact that the judge received a statement from the lawyer in which client's secrets are revealed violates the judges duty to remain fair. The above conduct creates not only the appearance of impropriety and bias but invites injury to the defendant."

[App F, Decla Margolin, a professor and 40 year veteran of criminal law].

> The trial court's comments prompting the government to consider inevitable discovery indicate that it had studied these portions of the correspondence, and was prepared to use Attorney Waltz' arguments against Mr. Hazlewood to assist the government in defeating standing at the suppression hearing.

[App G, Decla Lamsen & Looney]

Petitioner filed a Motion for Release to the Ninth Circuit on March 16, 2005, based on the extraordinary circumstances of this case and a substantial likelihood of reversal on appeal. The government opposed this motion on March 28, 2005. On April 8, 2005, the motion was denied without prejudice to renewal if the Certificate of Appealability is granted. The Court of Appeals obtained a complete copy of the trial record but denied a Certificate of Appealability on October 7, 2005, without opinion, after eight months of consideration.

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[13]Declarations attached as Exhibit 3 of the Motion for COA, by Attorneys Barbara E. Bergman of New Mexico (UNM Law); Walker L. Chandler of Georgia; Clay Conrad and Michael Minns of Texas; Jeffrey Friedman, Laurence Lichter, Ephraim Margolin (U.C. Berkley/ Hastings), and Dennis Roberts of California; and Linda Friedman Ramirez of Florida

V. ARGUMENT

Supreme Court Rule 10(a) suggests that certiorari be granted where, as here, "(a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power." Khanh Phuong Nguyen v. U.S., 539 U.S. 69, 73 (2003).

Under 28 U.S.C. § 2253(c), a certificate of appealability should issue if the applicant "has made a substantial showing of the denial of a constitutional right." To satisfy § 2253(c), a petitioner must demonstrate that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." Slack v. McDaniel, 529 U.S. 473, 484 (2000). The standard is not whether petitioner has shown that he will succeed on appeal, or even that "some jurists would grant the petition for habeas corpus." Miller-El v. Cockrell, 537 U.S. 322, 338 (2003) (emphasis added). "A claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail." Id. Even in the context of federal habeas, courts are not to prejudge the merits of the petitioner's claim, nor does deference does not imply abandonment or abdication of judicial review. Miller-El v. Cockrell, 537 U.S. at 336-7, 340. Finally, "the Court must resolve doubts about the propriety of a COA in the petitioner's favor," and the standard for meeting the threshold inquiry is "relatively low." Jennings v. Woodford, 290 F.3d 1006, 1009, 1010 (9th Cir. 2002), cert. denied, 539 U.S. 958 (2003).

A. Denial of Certificate of Appealability

After reading the Waltz submission, any future ruling made by the court, including rulings on this suppression motion and pre-trial rulings, evidentiary rulings during trial, and the denial of the § 2255 motion, necessarily were directed by the submissions content most of which Waltz had authored, which catalyzed the need to the Judge to embrace the many falsities of Waltz' letters. The proceedings after the concealment were not only tainted, they were poisoned. The question as to whether "the poison letters" met the standard of a debatable question can only be answered affirmatively, especially after eight months of consideration.

In cases where ex-parte communications are with the prosecutor, prejudice is presumed for due process violation absent a "compelling justification." Guenther v. Commissioner, 939 F.2d 758, 761 (9th Cir. 1991); Alexander Shokai, Inc. v. Commissioner, 34 F.3d 1480, 1484-1485 (9th Cir., 1994); U.S. v. Pollard, 959 F.2d 1011, 1031 (DC Cir. 1992) (Court denied having received the communication). The polestar is "impartiality and the appearance of impartiality." Haines v. Liggett Group, 975 F.2d 81 (3rd Cir. 1992). The burden of proving lack of prejudice is on the (prosecution), and it is a heavy one. U.S. v. Hackett, 638 F.2d 1179 (9th Cir., 1980); U.S. v. Minsky, 963 F.2d 870, 874 (6th Cir. 1992)(sidebar conference with prosecutor alone); U.S. v. Wolfson, 634 F.2d 1217, 1221 (9th Cir. 1980); U.S. v. Alverson, 666 F.2d 341, 348-349 (9th Cir.,1982) (communication with a federal agent); U.S. v. Reese 775 F.2d 1066; (9th Cir. 1985) (improper ex parte communication). This ex-parte communication was more serious than a prosecutor's as it contained details of Waltz' view of petitioner's character, case strategies and witness information that the prosecution would not have known.

Reversal is mandated where prejudicial attorney-client privileged information was admitted at trial. Hunydee v.

US, 355 F.2d 183 (9th Cir. 1965)(attorney's statement that defendant would plead guilty at conference with co-defendant); US v. White, 281 ; 887 F.2d 267 (DC Cir. 1989)(improper admission of highly prejudicial evidence of a privileged communication); U.S. v. Bauer (132 F.2d at 508)(legal advice regarding bankruptcy). Here, however, the prejudicial statements were presented, not to the jury directly, but to the Court, who did not then remain impartial. A detached, fair, and impartial judge is not one who assumes the role of prosecutor and produces evidence, essential to overcome the defendant's presumption of innocence, which the government has declined to present. U.S. v. Karnes, 531 F.2d 214, 216-7 (4th Cir. 1976); U.S. v. Murchison, et al, 349 U.S. 133, 136 (1955); U.S. v. Van Dyke, 14 F.3d 415, 417 (8th Cir. 1994) (court assumed the mantle of an advocate).

Judge Taylor's pervasive bias is unmistakable and violated the separation of powers doctrine when he single handedly saved the evidence of a five week warrant-less search and the summaries that were the fruit of its poisonous tree, Wong Sung v. U.S., 371 U.S. 471 (1962). In U.S. v. Wilkerson, 208 F.3d 794, 798 (9th cir. 2000), the Court had recognized that charging decisions are within the government's purview did not force a specific firearms charge. Here, however, Judge Taylor Ordered inevitable discovery be briefed, and only after the legality of the search had been taken under advisement for several months, and on the eve of trial, a schedule that implicates the ruling as pre-determined. Instead of the expected final decision, with the right to appeal, the Order gave the government a limitless argument period and advantage, one that they would not need as the ruling was obvious and pre-determined to salvage the government's case. Having admitted the evidence, the Court then refused to allow the Petitioner to have access to the material during his trial, at the time when he needed it the most.

At a minimum, an evidentiary hearing should have been granted. 28 U.S.C. § 2255. As this Court has said, "a claim must be 'so palpably incredible or patently frivolous as to warrant summary dismissal' in order to justify the refusal of an evidentiary hearing." U.S. v. Howard, 381 F.3d 873, 877 (9th Cir. 2004), quoting U.S. v. Leonti, 326 F.3d 1111, 1116 (9th Cir. 2003) (counsel was ineffective for allowing him to plead guilty while taking narcotic painkillers). Here, Mr. Hazlewood's claim is not "palpably incredibly" or "patently frivolous." He attached extensive documentation establishing his lawyer's gross misconduct and several unresolved factual questions. These included an inquiry of Mr. Waltz as to why he submitted the correspondence to the Court; whether he knew it was a violation of California's Professional Code; and, if so, whether he had reason to believe that his professional misconduct would not be reported to the California Bar Association. In addition, Mr. Hazlewood was entitled to explore whether the government received any or all of the correspondence in that the government had notice of some of the matters that appeared in the improperly submitted correspondence. Apparently, the government has never formally denied receiving notice. This issue, alone, merits an evidentiary hearing.

B. Constitution of the Trial Mechanism

This violation of the right to trial by an impartial judge is certainly a "structural defect in the constitution of the trial mechanism, which defies] analysis by 'harmless-error' standards" under Arizona v. Fulminante, 499 U.S. 279, 309 (1991). Some errors will always invalidate the conviction. Gideon v. Wainwright, 372 U.S. 335, 9 L. Ed. 2d 799, 83 S. Ct. 792 (1963) (total deprivation of the right to counsel); Tumey v. Ohio, 273 U.S. 510, 71 L. Ed. 749, 47 S. Ct. 437 (1927) (mayor sitting as prohibition judge was compensated by how many convictions he obtained). Here,

as in Tunney, the Court had an interest in assuring a conviction, avoiding an evidentiary hearing, and making factual findings so as to avoid reversal by the Ninth Circuit because he did not want his concealment of the Waltz submission to be brought to light. That even purportedly fair adjudicators "are disqualified by their interest in the controversy to be decided is, of course, the general rule." Hamdi v. Rumsfeld, 542 U.S. 507 (2004) (citing Tumey v. Ohio, 273 U.S. 510 (1927)); Schweiker v. McClure,456 U.S. 188, 194 (1982)(hearing officers' incomes are entirely dependent upon the carrier's decisions to call upon their services). A criminal defendant tried by a partial judge is entitled to have his conviction set aside, no matter how strong the evidence against him. Edwards v. Balizak, 520 U.S. 641, 647 (citing Tumey v. Ohio, 273 U.S. 510, (1927); Arizona v. Fulminante, 499 U.S. 279, 308 (1991)).

This Court has repeatedly recognized that judicial bias, or even the appearance of bias, violates the Due Process Clause. Concrete Pipe & Products v. Constr. Laborers Pension Trust, 508 U.S. 602, 617 (1993) Trial before an 'unbiased judge' is essential to due process." In re Murchison, 349 U.S. 133, 136 (1955) . One of the essential pillars of a fair trial, of course, is an open-minded and disinterested judge. When a party claims to have been deprived of due process on the basis of judicial bias, "the test is whether the [judicial officer's] situation is one which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear, and true between the state and the accused . . . ." Ward v. Village of Monroeville 409 U.S. 57, 59-60(1972) (citing Tumey v. Ohio, 273 U.S. 510, 523 (1927).

Here, the Waltz submission should be considered as an extra-judicial source. Liteky v. United States, 510 U.S. 540, 551 (1994). It appears that the court was uncomfortable with his own action and angered by the petitioner as

the reason for his dilemma so he had to assure the conviction, even if that meant violating the law. The Petitioner believed and trusted in the judicial system, and never had a chance.

C. Sixth Amendment Issue

The Sixth Amendment provides that a criminal defendant is entitled to "the Assistance of Counsel for his defense." U.S.C.A. VI. The right to counsel is accorded "not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial." U.S. v. Cronic, 466 U.S. 648, 658 (1984). It is well-established that the right to counsel means the right to "the effective assistance of counsel." Id. at 654, quoting McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970). The Petitioner must demonstrate that counsel's performance was deficient and that it caused prejudice. Strickland v. Washington, 466 U.S. 668, 687 (1984). Simply put, "ineffective assistance under Strickland is deficient performance by counsel resulting in prejudice." Rompilla v. Beard, 125 S.Ct. 2456, 2462 (2005). Counsel's effectiveness is measured against an "objective standard of reasonableness," relying on "prevailing professional norms." Strickland, 466 U.S. at 688. First and foremost, in representing a criminal defendant, "counsel owes the client a duty of loyalty." Id. If this means anything, it means that a criminal defense lawyer cannot "protect" himself against theoretical claims that his client might make at some future date by divulging prejudicial client confidences.

In Rompilla, its most recent analysis of a Sixth Amendment ineffectiveness claim, this Court reaffirmed that the reviewing court should examine the "norms" of defense counsel practice in evaluating whether counsel has complied with his duty of zealous advocacy. The Court then relied on the American Bar Association Standards for Criminal Justice in assessing whether counsel in that case had failed his client by failing to review his file. Rompilla, 125

S. Ct. at 2465-66. Rompilla reaffirmed that "prevailing professional norms" are reflected in American Bar Association standards and State professional ethics codes. Id. at 2466, quoting Wiggins v. Smith, 539 U.S. 510, 524 (2003). See also Strickland, 466 U.S. at 688-89. The Declarations filed in support of the Petitioner's Motion for a COA provide strong additional evidence that Waltz' conduct fell below norms.

Here, Waltz violated "prevailing professional norms," breaching his ethical duties by revealing client confidences in order to "protect himself from a possible later claim" when it is probable that he had some assurance against a malpractice or disciplinary action, and was in truth acting to assist the opposition. Our legal system, and especially our criminal justice system, depends on a lawyer maintaining his duty of loyalty to his client and preserving his client's confidences. In Re Jordan, 12 Cal.3d 575, 579-80 (1974). This is not only a "rule of mere professional conduct, but instead involves public policies of paramount importance." Id. Consequently, the ABA Model Rule of Professional Conduct 1.6 and ABA Standards For Criminal Justice at 4-3.7 proscribe revealing information relating to representation of a client without consent, implied authorization, or if necessary to prevent a criminal act that defense counsel believes is likely to result in imminent death or substantial bodily harm. The ABA also prohibits defense counsel from allowing his "professional judgment or obligations to be affected by his or her own political, financial, business, property or personal interests." Id. at 4-3.5(a). Presumably, this includes a "personal interest" in creating an advance defense against a possible lawsuit or ineffective claim.

California itself prohibits the very attorney malfeasance in which Mr. Waltz engaged; Ca. Bus. and Prof. Code, § 6068(e)(1); Ca. Code of Professional Conduct, Rule 3-100(A).

Mr. Hazlewood could not give informed consent because his lawyer never told him that he intended to breach confidentiality. Nor was Mr. Hazlewood, who was incarcerated, threatening to commit a criminal act and certainly not one likely to result in substantial bodily harm to any individual.

Generally, a defendant raising an ineffectiveness claim must demonstrate an impact on the outcome of the proceedings. However, "where assistance of counsel has been denied entirely or during a critical stage of the proceeding . . . the likelihood that the verdict is unreliable is so high that a case-by-case inquiry is unnecessary." Mickens v. Taylor, 535 U.S. 162, 166 (2002). In other words, the deprivation of counsel during any critical stage of the proceeding by itself establishes prejudice. Moreover, a defendant whose attorney is laboring under an actual conflict of interest demonstrates a violation of his Sixth Amendment right to counsel if the conflict "adversely affected his lawyer's performance." Cuyler v. Sullivan, 446 U.S. 335, 348 (1980). And, as the Court has recognized, the performance of counsel who is "actually" conflicted is necessarily adversely affected, rendering the ultimate verdict unreliable. Mickens, 532 U.S. at 171-72. In short, when, as here, there is an actual conflict, prejudice is presumed. Id. During the ten weeks that Waltz represented the Petitioner, his efforts directed, not assisting the Petitioner, but at drafting the letters that were clearly were written with the intent that someone other than Petitioner would eventually read them. He put $100.00 on Petitioner's jail account, perhaps to soften him up to accept a plea without knowing the weaknesses of the government's case. The trial mechanism was riddled with a plethora of "factory defects" from the onset of the proceedings.

There can be no serious dispute that this submission by James L. Waltz was an unprofessional error, violated Petitioner's rights to effective counsel, attorney client and

work product privilege, and zealous representation. The only unknown is the "why" and with whom did he conduct himself in this manner. From the deception, the hiding of the contents behind a benign motion, his efforts were clearly measured to avoid detection, and the critical question that could only have been answered at an evidentiary hearing, was whether Judge Taylor knew or advised him in regards to this filing. Even more disturbing is the possibility that it was not the first time, or the last, that Waltz and Judge Taylor had engaged in similar transactions, as Waltz' craftiness and skill at hiding the submission from his client while technically making it part of the record raise the specter of previous past experiences. Having placed a plethora of false and damaging information before the trial court, in clear conflict between self interest in maintaining the appointment and representing his client, and became his client's adversary. The only federal case in any way analogous is a death penalty conviction that was overturned for Petitioner's attorney's negative statements to both the jury and the media. Osborn v. Shillinger, 861 F.2d 612 (10th Cir. 1988). Recently, the Pennsylvania Supreme Court remanded a case for evidentiary hearing because the petitioner's attorney had written to the consulting psychiatrist that the petitioner may have epitomized the banality of evil. Commonwealth v. Washington, 880 A.2d 536 (2005).

Here, the novel and clearly "debatable" question over which reasonable jurists might disagree, and, therefore, which itself merits the granting of a COA, is whether prejudice should be presumed from Mr. Waltz's gross violation of professional ethics and the attorney-client privilege. Counsel was conflicted – that much is clear. The conflict may have been self-imposed, reflecting counsel's readiness to betray his client in order to protect himself from a future claim, but the conflict nonetheless was very real. During the time that Mr. Waltz purported to represent Mr.

Hazlewood, Mr. Waltz was concerned, not about Mr. Hazlewood, but about saving his own reputation and money. During the time that Mr. Waltz purported to represent Mr. Hazlewood, Mr. Hazlewood, in effect, had no counsel. The violation of his Sixth Amendment right was complete even without a showing of prejudice. Prejudice must be presumed and the Section 2255 motion should have been granted.

D. Due Process and Fair Trial Issue

Mr. Hazlewood had also raised a debatable question concerning the trial court's failure to advise Mr. Hazlewood of his counsel's breach of professional ethics and disclosure of confidential communication so that Mr. Hazlewood could make an informed decision about how to proceed, and, in particular, whether to seek to recuse the Judge in light of the extrajudicial information provided. As Mr. Hazlewood argued in his MCA, 28 U.S.C. § 455(a) requires that a judge recuse himself when his "impartiality may reasonably be questioned." Likewise, under Section 455(b)(1), a judge must recuse himself when he has "personal knowledge of disputed evidentiary facts concerning the proceeding." Here, the trial Judge obtained knowledge of facts extrajudicially – though an improper disclosure of attorney-client communication. His recusal, therefore, was mandated. Koon To Pau v. Yosemite Park 928 F.2d 880, 885 (9th Cir. 1991); Alexander v. Primerica Holdings, Inc. 10 F.3d 155, 162 (3rd Cir. 1993); U.S. v. Anderson, 160 F.3d 231, 233 (9th Cir. 1998).

Moreover, once the trial court was made privy to the private and privileged communications between counsel and his client, it became incumbent on the court to take steps to ensure that Mr. Hazlewood did not suffer any further prejudice. The court, in our view, was, at a minimum, required to advise Mr. Hazlewood of the problem; it then had several options: it could have appointed counsel to represent Mr. Hazlewood and advise him on how to

proceed; alternatively, the Judge could have recused himself sua sponte because of the appearance of impropriety and because he had obtained personal knowledge of evidentiary facts. What the court could not do, but what it unfortunately did do, was continue the deception being practiced on this defendant. There is also a "debatable" question about whether, if prejudice is not to be presumed, prejudice was demonstrated. Prejudice under Strickland does not mean that the outcome of the case would have been different, but a reasonable probability is a probability sufficient to undermine confidence in the outcome.

466 U.S. at 694. In this case the District Court became a participant in Waltz' wrongdoing when he accepted, read, and concealed the submission from Petitioner. The Court had a personal interest in assuring Petitioner's conviction to prevent his concealment of the submission secret. Bracy v. Gramley, 520 U.S. 899 (1997)(reversal where judge covered his corruption with a pro-prosecution bias on cases where he did not receive bribes). In his initial MCA, Mr. Hazlewood set forth the myriad ways in which counsel's Declaration and disclosure of privileged communications prejudiced him. In particular, the court ordered briefing on the inevitable discovery doctrine which was first mentioned by Mr. Waltz in a letter to his client.

Mr. Waltz discussed the government's star witness, CPA Tony Lam. As a result, the District Court refused to allow the petitioner to hold Mr. Lam overnight for recall, knowing that the pro se Petitioner was in serious trouble and surprised by Lam's devastating testimony. Lee v. Kemna, 534 U.S. 362 (2001)(vacated and remanded where the court had refused to grant the petitioner an overnight stay to locate alibi witnesses who had left the courthouse), Traguth v. Zuck, 710 F.2d 90, 93 (2nd Cir. 1983) (The court's duty is even broader in the case of a pro se defendant who finds herself in court against her will with little time to learn

the intricacies of civil procedure). The court's refusal to order that he be given copies of the evidence illegally seized, that none of his attorneys had examined violated F.R.Crim.Proc. 41(e)[predecessor to 41(g)], U.S. v. In Re Search of Law Offices, 341 F.3d 404, 422 (4th Cir. 2003), U.S. v. Garcia, 65 F.3d 17, 19 (4th Cir. 1995).

In addition to these and other devastating comments by counsel, there is non-specific prejudice that cannot be ignored. The extent of the damage is an evil impossible to measure, and these examples are probably only "the tip of the iceberg." [Lamsen & Looney, App F] Counsel told the court that he believed his client was hostile and abusive, guilty, mentally ill, and considering obstruction of justice. Yet Mr. Hazlewood was unaware of these disclosures. Moreover, counsel who substituted in for Mr. Waltz was also unaware of these disclosures and, therefore, could not factor them in when he drafted the suppression motion and conducted other pre-trial proceedings on Mr. Hazlewood's behalf. Thus, subsequent defense counsel could not address any of Mr. Waltz's concerns or characterizations in an effort to mitigate the harm that had already been done.

VI. CONCLUSION

The Petition for a Writ of Certiorari should be granted for the reasons discussed above, and the denial of the Motion for Release pending this appeal should be reversed and Petitioner's Release Ordered by this Honorable Court.

DATED: _____, 2006.

Respectfully submitted,

Nancy Lord
5079 N. Dixie Highway, No. 334
Oakland Park, FL 33334
954-643-2837

APPENDIX

APPENDIX A: ORDER DENYING CERTIFICATE OF APPEALABILITY

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
FILED OCT 07 2005 CATHY A. CATTERSON,
CLERK U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
LAWRENCE R. HAZLEWOOD,
Defendant-Appellant

No. 05-55016
D.C. Nos. CV-03-01671-GLT
CR-97-00017-GLT
Central District of California (Santa Ana)

ORDER

Before: RYMER and McKEOWN, Circuit Judges.

The request for a certificate of appealability is denied. See 28 U.S.C. § 2253(c)(2). All outstanding motions are denied.

APPENDIX B: ORDER DENYING RELEASE WITHOUT PREJUDICE

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
FILED APRIL 8, 2005 ,
CLERK U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
LAWRENCE R. HAZLEWOOD,
Defendant-Appellant

No. 05-55016
D.C. Nos. CV-03-01671-GLT
CR-97-00017-GLT
Central District of California (Santa Ana)

ORDER

Before: KOZINSKI, and HAWKINS, Circuit Judges.

Aplt's mtn for bail pending appeal of the DC's denial of his 28 U.S.C. 2255 mtn is DENIED without prejudice to renewal if the Certificate of Appealability is granted. (cite) The request for a Certificate of Appealability will be addressed by separate order.

APPENDIX C: ORDER OF DENIAL OF THE §2255 AND CERTIFICATE OF APPEALABILITY BY THE DISTRICT COURT

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION
Filed Oct 18 2004

UNITED STATES,
Plaintiff-Respondent,
vs.
LAWRENCE R. HAZELWOOD [sic]
Defendant-Petitioner
Case No. SA CV 03-1671-GLT; SA CR 97-17(A)-GLT

ORDER DENYING MOTION TO VACATE SET ASIDE, OR CORRECT JUDGMENTAND SENTENCE UNDER 28 U.S.C. § 2255

I. BACKGROUND

After a jury trial in which he represented himself, Petitioner Lawrence R. Hazlewood was found guilty of eight counts of mail fraud and three counts of tax evasion. The Court sentenced Petitioner to 135 months of imprisonment.

Petitioner now brings a motion to vacate, set aside, or correct judgment and sentence under 28 U.S.C. § 2255, asserting his pretrial attorneys were constitutionally ineffective. Petitioner claims ineffective assistance of counsel on four grounds: (1) failing to negotiate a favorable plea bargain, (2) failing to advise him of potential sentencing exposure, (3) losing a suppression motion, and (4) disclosing attorney-client correspondence. Petitioner also moves for relief from sentence enhancements imposed by the Court on the ground they are unconstitutional under Blakely v. Washington, 124 S. Ct. 2531 (2004).

II. DISCUSSION

A. Ineffective Assistance of Counsel

To prevail on his ineffective-assistance-of-counsel claims, Petitioner must demonstrate (1) constitutionally deficient performance of counsel, and (2) resulting prejudice. See Strickland v. Washington, 466 U.S. 668, 687 (1984). A showing of deficient performance requires counsel's acts and omissions fall below an objective standard of reasonableness. Id. at 669. To show prejudice, Petitioner must show there is "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 698. "The object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice . . . that course should be followed." Id. 697.

1. Failure to Negotiate a Favorable Plea Agreement

To qualify result in "[a] show mischaracterization of the likely outcome." Iaea v. Sunn, 800 F.2d 861, 865 (9th circ. 1986).

Petitioner argues each of his attorneys - Leon Peterson, James Waltz, Kenneth Reed, and Jerry Steering – failed to negotiate and offer Petitioner a favorable plea agreement. Petitioner's first counsel, Mr. Peterson, visited Petitioner in jail and showed him a government plea agreement offering 37 to 46 months. (Peterson Decl. ¶ 7.) Petitioner claims the government's initial offer was 33 to 41 months, and asserts he wanted to avoid a possible mistake by rushing to a decision. Mr. Peterson warned Petitioner the offer would be good for only a short time, but Petitioner delayed acceptance. (Pet'r's Decl. 47:10-12.)

Petitioner's second counsel, Mr. Waltz, advised Petitioner to enter into settlement discussions and warned Petitioner of the consequences of delay. (Waltz Decl. ¶ 9.) Petitioner then rejected another government plea offer. (Pet'r's Mot. 14:21-22.) Mr. Waltz also advised Petitioner of his option to enter into a conditional plea agreement.

(Waltz Decl. ¶ 4.) The government ultimately never offered a conditional plea, and Petitioner has made no showing such an offer, but Petitioner refused settlement discussions and warned he had fired attorneys for broaching the topic. (Reed Decl. ¶¶ 3-5.)

Petitioner's fourth counsel, Mr. Steering, attempted to negotiate a plea offer, and Petitioner claims he did not accept a plea offer because of Mr. Steering's lack of knowledge of the Federal Rules of Criminal Procedure. (Pet'r's Mot. 17:18-22.) Petitioner has offered no evidence of Mr. Steering's claimed errors.

Petitioner refused to meet with his attorneys on a number of occasions, did not allow them to discuss settlement offers, and rejected numerous government plea offers. (Waltz Decl. ¶ 33.) Petitioner is unable to show prejudice. His claim for ineffectiveness of counsel for failure to negotiate a favorable plea agreement is not supported.

2. Failure to Advise of Potential Sentencing Exposure

Petitioner asserts his first counsel, Mr. Peterson, failed to advise him of the maximum sentence he could receive if he lost at trial. Mr. Peterson prepared a chart[1] ("the Peterson chart") showing the best and worst sentencing scenarios. This chart shows a possible maximum sentencing range of 108-135 months. Petitioner claims he was shown the Peterson chart and was instead shown a chart ("the Hazelwood chart") reflecting a maximum sentence of only 46 months. (Pet'r's Reply 1:9-12).

Petitioner points to the maximum sentence portion of the Peterson chart, which is written in a different ink color from the rest of the chart, and suggests this indicates the maximum sentence was added at a later time outside of his presence. Petitioner contrasts the two-in-color Peterson chart with the one-in-color Hazelwood chart to further support this contention. (Pet'r's Reply 1:19-22.)

In response, Mr. Peterson states he calculated the maximum sentence during a meeting with Petitioner and filled in that information on his own copy of the chart while

discussing the potential sentencing exposure with Petitioner. Mr. Peterson asserts Petitioner retained a copy of the chart without this information. (Peterson Supp. Decl. ¶ 5.)

Petitioner's emphasis on the discrepancies between the two charts is misplaced. The relevant issue is not whether Petitioner was shown a chart showing the maximum possible sentence, but whether he was informed of the maximum possible sentence. Petitioner ignores Mr. Peterson's statements that he verbally advised Petitioner "the likely sentencing range should he lose at trial would be 108 to 135 months" (Peterson Decl. ¶ 9) and that he is sure that [he] did review with Mr. Hazelwood [sic] the worst sentencing scenario should he take the case to trial and be convicted." (Peterson Supp. Decl. ¶ 6). Also, the government's proposed plea agreement used by Mr. Peterson in preparing his chart advised Petitioner of a potential maximum sentence of 23 years incarceration. (Peterson Decl ¶ 4 Ex. A.) Petitioner was advised of his maximum sentencing exposure regardless of the differences between the two charts.

3. Loss of the Suppression Motion

Petitioner must "demonstrate that [counsels'] errors actually prejudiced him." Pizzuto v. Arave, 280 F.3d 949, 955 (9th Cir. 2002). To do so, Petitioner has the burden to "affirmatively prove prejudice as a result of his attorney losing a motion to suppress evidence.

Petitioner argues Mr. Reed was ineffective because he lost a motion to suppress evidence based on the government's unconstitutional search and seizure of Petitioner's place of business. The government opposed the motion, asserting Petitioner lacked standing because his office building mortgagor foreclosed on the property and the evidence it contained had been abandoned by Petitioner.

Petitioner alleges his counsel inadequately briefed the issue of standing. Pet'r's Mot. 34: 17-19.) Petitioner provides no specifics detailing the manner in which the stand-

ing issue was inadequately briefed. Petitioner fails to offer any evidence indicating his counsel misunderstood the law or the facts, did not make an important argument, or did not cite a significant case.

4. Disclosure of Attorney-Client Correspondence

Petitioner asserts Mr. Waltz was ineffective because he submitted his entire attorney-client correspondence file to the Court and also served it on the government's counsel. (Pet'r's Mot. 4:7-9). Petitioner claims the file provided the government with details about his legal strategies, prospective witnesses, and other privileged information, which prejudiced the outcome of his trial. (Pet'r's Mot. 31:1-2, 31:24-26.)

Mr. Waltz's file, however, was not served on the government's counsel; it was attached as an exhibit to a declaration filed under seal. The government's counsel was served only with a "Notice of Filing Documents Under Seal." (Waltz Decl. ¶¶ 48-49.) The government's counsel did not have access to the file and could not have made use of it.

Petitioner also argues he was prejudiced by his counsel's submission of the file to the Court because the file provided the theory on which his suppression motion was denied. Petitioner asserts the file raised the inevitable discovery doctrine because it contained a letter from his counsel advising that even if he won the suppression motion, the government could still obtain critical evidence from bank records. Although Petitioner complains the Court raised this issue *sua sponte* based on the file information, the record reflects the government's counsel first raised the issue. (See Crim. Docket, Item # 145.)

B. Validity of Sentence Enhancements

Petitioner was convicted of eight counts of mail fraud and tax evasion, resulting in base-level sentencing range of 37-46 months pursuant to the U.S. Sentencing Guidelines. The Court imposed sentence enhancements based on specific offense characteristics, resulting in a sentence of 135 months. Petitioner's conviction became final on December 2, 2002, the date the U.S. Supreme Court denied

his petition for certiorari. Petitioner argues the sentence enhancements imposed by the Court are unconstitutional under Blakely v. Washington, 124 S.Ct. 2531 (2004), because they were not supported by facts Petitioner admitted as part of a guilty plea or found by a jury to have been proved beyond a reasonable doubt. (Reply 18:19-23.) Petitioner argues Blakely should be applied retroactively, requiring the sentence enhancements to be set aside or vacated.

In its decision in Schriro v. Summerlin, 124 S.Ct. 2519 (2004), on the same day it decided Blakely, the Supreme Court signaled it does not characterize the Blakely rule as a watershed procedural rule requiring retroactive application.

Every court to rule on the issue has held Blakely does not apply retroactively on collateral review. Courts that have so held include two circuit courts and several district courts. See Simpson v. United States, 376 F.3d 679, 681 (7th Cir. 2004); In re Dean, 375 F.3d 1287, 1290 (11th Cir. 2004)(recognizing that by issuing Summerlin on the same day it released Blakely, "the Supreme Court has strongly implied that Blakely is not to be applied retroactively"); Garcia v. United States, No. 04-CV-0448-C, 2004 WL 1729479, at *1 (W.D. Wis. Aug. 2, 2004); United States v. Traeger, 325 F. Supp. 2d 860, 864 (N.D. Ill. 2004); United States v. Stoltz, 325 F. Supp. 2d 982, 987 (D. Minn. 2004); Patterson v. United States, Nos. CIV.A. 03-CV-74948-D, CRIM. 96-CR-8016001, 2004 WL 1615058, at *4 (E.D. Mich. July 2, 2004).

This Court adopts the weight of authority: Petitioner may not rely on Blakely in this collateral attack on his sentence.

III. DISPOSITION

Petitioner's motion to vacate, set aside, or correct judgment or sentence is DENIED.

DATED: October 15, 2004.

s/Gary L. Taylor

GARY L. TAYLOR
UNITED STATES DISTRICT JUDGE

Filed Nov 29 2004
UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
LAWRENCE R. HAZLEWOOD, Petitioner
Vs.
UNITED STATES OF AMERICA, Respondent,
No. 05-55016

ORDER RE:
CERTIFICATE OF APPEALABILITY

On 11/18/04, Petitioner filed a Notice of Appeal and a request for a Certificate of Appealability pursuant to 28 U.S.C. § 2253. The Court has reviewed the matter.

IT IS HEREBY ORDERED:

_ The Certificate of Appealibilty is GRANTED. The specific issue(s) satisfy § 2253(c)(2) as follows:

[certificate of mailing]

X The Certificate of Appealibility is DENIED for the following reason(s):

X There has been no substantial showing of the denial of a constitutional right.

_ The appeal seeks to test the validity of a warrant to remove to another district or place for commitment or trial.

_ The appeal seeks to test the validity of the detention pending removal proceedings.

Dated November 29, 2004

Gary L. Taylor

United States District Judge

Entered on ICMS Dec -1 2004

APPENDIX D: CONSTITUTIONAL PROVISIONS, STATUTES ORDINANCES AND REGULATIONS

UNITED STATES CONSTITUTION

USCS Const. Amend. 4

Unreasonable searches and seizures.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

USCS Const. Amend. 5

Criminal actions—Provisions concerning—Due process of law and just compensation clauses.

No person shall be held to answer for a capital, or otherwise infamous crime, unless . . . . . nor be deprived of life, liberty, or property, without due process of law . . . ..

USCS Const. Amend. 6

Rights of the accused.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, . . . to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

FEDERAL STATUTES

18 USC §1341

Frauds and swindles

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, . . . or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service . . . ..

Jencks Act, 18 USCS § 3500

Demands for production of statements and reports of witnesses

(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) shall be the subject of subpena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.. . . .

(d) If the United States elects not to comply with an order of the court under subsection (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

26 USCS § 7206

Fraud and false statements [IRS].

Any person who—

(1) Declaration under penalties of perjury. Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter; or . . .

28 USC § 455

Disqualification of justice, judge, or magistrate [magistrate judge]

(a) Any justice, judge, or magistrate [magistrate judge] of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts

concerning the proceeding; . . .

28 USC § 2255

Federal custody; remedies on motion attacking sentence

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

FEDERAL RULES OF CRIMINAL PRCEDURE

USCS Fed Rules Crim Proc R 41(g) (formerly R 41(e))

(g) Motion to Return Property. A person aggrieved by an unlawful search and seizure of property or by the deprivation of property may move for the property's return. The motion must be filed in the district where the property was seized. The court must receive evidence on any factual issue necessary to decide the motion. If it grants the motion, the court must return the property to the movant, but may impose reasonable conditions to protect access to the property and its use in later proceedings.

SUPREME COURT RULES

USCS Supreme Ct R 10

Rule 10. Considerations Governing Review on Certiorari

Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:

(a) a United States court of appeals has entered a decision . . . . or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;

STATE RULES

Cal Bar Rules, Prof Conduct R 3-100(A)

Rule 3-100. Confidential Information of a Client

(A) A member shall not reveal information protected from disclosure by Business and Professions Code section 6068, subdivision (e)(1) without the informed consent of the client, or as provided in paragraph (B) of this rule.

Cal Bus & Prof Code § 6068(e)(1)

(e)(1) To maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client.

ABA STANDARDS

ABA Model Rule of Professional Conduct 1.6

"A lawyer shall not reveal information relating to the representation of a client."

ABA Standards for Criminal Justice Standards 4-3.7

"defense counsel shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation and except that defense counsel may reveal such information to the extent he or she reasonably believes necessary to prevent the client from committing a criminal act that defense counsel believes is likely to result in imminent death or substantial bodily harm."

ABA Standards for Criminal Justice at 4-3.5.

"professional judgment or obligations to be affected by his or her own political, financial, business, property or personal interests." Id. at 4-3.5(a)

District Court Local Rule 12 1.2

L.Cr.R. 12- 1.2 Response of Government.

Unless otherwise ordered by the Court, the government shall file a response and any declarations in opposition to the motion not later than seven (7) days after service of the motion.

APPENDIX E: DECLARATION OF JAMES L. WALTZ FILED ON FEBRUARY 3, 1998

James L. Waltz, Esq.
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23030 Lake Forest Drive
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ATTORNEY FOR DEFENDANT: LAWRENCE R. HAZLEWOOD

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff,

LAWRENCE R. HAZLEWOOD,

Defendant.

Case No.: SA CR 97-17-GLT

DECLARATION OF JAMES L. WALTZ IN SUPPORT OF:

1. COUNSEL'S EX PARTE MOTION TO CONTINUE MOTIONS AND TRIAL DATE (NOT UNDER SEAL
2. COUNSEL'S EX PARTE APPLICATION FOR THE ISSUANCE OF TWO SUBPENA DUCES TECUM AND THE EARLY RETURN OF RECORDS (FILED UNDER SEAL)

DECLARATION FILED UNDER SEAL

DECLARATION OF JAMES L. WALTZ

I, James L. Waltz,[1] declare as follows:

1. I am thoroughly familiar with the facts and information set forth below and if called upon to testify, I could

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[1] Later attorneys declare they relied on Mr. Peterson's charts in discussing Petitioner's potential exposure. (Pet'r's Motion App. I Ex. 14 ¶ 26.)

and would competently testify to matters described herein.

2. In early November, 1987, I was appointed under the Criminal Justice Act to represent Lawrence R. Hazlewood, Defendant in the above captioned matter. The Court is already familiar with this case and the circumstances surrounding Defendant's stormy relationship with his first two appointed counsels. FPD Leon Peterson, followed by panel counsel John Barton. For each attorney, Mr. Hazlewood claimed ineffectiveness and conflict. Shortly after I was appointed, I also began to have difficulties with Mr. Hazlewood. I then interviewed former counsel to understand Mr. Hazlewood; my purpose was to better equip myself so to avoid further problems. I have enjoyed very limited success however.

3. I want to emphasize that I am NOT asking to be relieved. I plan on completing this assignment and providing Mr. Hazlewood effective representation at all times. However, for my own protection against any counter claim of ineffectiveness, or threat of physical reprisal, or for purposes of rebutting some forthcoming lawsuit or Bar complaint, I want to ensure there is some record before the Court regarding my difficulties with Mr. Hazlewood. I am also filing this declaration in support of my extra ordinary needs re: 1) delaying the trial, 2) obtaining discovery from the Government, and 3) my need for in District and out of District SDT's under seal, calling for the earlier return of records. See counsel's ExParte Applications filed separately.

5.[sic] After being appointed, I meet [sic] with Mr. Hazlewood at the Santa Ana Jail. Mr. Hazlewood was very difficult from the start: demanding, controlling, and manipulative. He refused to answer most questions and when pressed for any details, he attempted to control the conversation, mostly lecturing about this or that, while venting about being victimized by the system. He was very repetitious and any conversation never stayed on track. When I tried enforcing some structure to our discussions, he viewed that as a challenge of will power and his authority as a client. After only four or five in person conversations, De-

fendant grew very hostile and abusive. He started refusing legal visits (e.g. November 23, 1998, and January 7, 13, 16, and 23, 1998).

6. Making things worse, Defendant refused to provide names of witnesses he claimed were favorable. In fact, Mr. Hazlewood has instructed his former counsel, Yolita J. Nowak, not to cooperate with me. See Ms. Nowak's letter to me dated January 23, 1998 (attached). Ms Nowak is very willing to cooperate with me, but for the "order" by Defendant.

7. I want to make some kind of record, for the purposes announced above. Toward that end, I have attached all the correspondence between counsel and Defendant; no exceptions. The letters are in order of date written. My letters chronicle my rocky relationship with Defendant and my attempts to gain his cooperation. My letters were written as ,my only means to communicate with Defendant and to serve a secondary purpose of documenting my difficulties. Defendant's last letter to me is very disturbing.

8. I am NOT trying to prejudice this Court in any way. On the contrary, Defendant is my client and I will only defend him, subject to remaining honest and ethical. The fact is however, I need the Court's assistance so I can provide effective representation. I also need to create some record visa via any future 2255 motion or complain [sic] against counsel. If nothing follows in that regard, then this information (under seal) is otherwise harmless to Defendant.

I declare under penalty of perjury that the information is true and correct.

Executed on February 3, 1998 in Laguna Hills, Calif

_____

James L. Waltz, Esq.

APPENDIX F: DECLARATIONS OF LEGAL SCHOLARS AND ATTORNEYS

NANCY LORD, MD
Attorney At Law
1970 N. Leslie Rd., No. 220
Pahrump, NV 89060
Telephone: (775) 253-0137
Facsimile: (775) 582-1301
Attorney for Appellant

U.S. COURT OF APPEALS NINTH CIRCUIT
LAWRENCE R. HAZLEWOOD, Appellant,
Vs.
UNITED STATES OF AMERICA, Respondent,
No. 05-55016

DECLARATION OF BARBARA E. BERGMAN, ESQ.

I, Barbara E. Bergman, Esq, declare under penalty of perjury as follows:

1. I am over eighteen years of age, and I have personal knowledge of the matters set forth herein.

2. I am a Professor of Law at the University of New Mexico School of Law, and was a Visiting Professor at Hastings College of Law in San Francisco in 1997 and an Adjunct Professor at Catholic University School of Law between 1980 and 1986.

3. I was co-counsel on the capital case of the State of Oklahoma v. Terry Nichols between 2000 and 2004.

4. I was a Staff Attorney, Public Defender Service, 451 Indiana Ave., N.W., Washington, D.C. 20001 between 1980 and 1984.

5. A copy of my curriculum vitae is attached.

6. I have received copies of the submission of James L. Waltz described as "ex parte motions to continue motion and trial date (not under seal) and the issuance of two

subpena [sic] duces tecum and the early return of property (filed under seal)" that contained a detailed declaration as to his dealings with his client and his entire file of privileged and attorney work product correspondence between himself and his client.

7. The filing of all correspondence between the attorney and the client in this manner at this stage of the case is a blatant violation of the attorney's ethical obligation to maintain the confidentiality of his communications with his client.

8. There is no justification for such behavior. It is clear that Mr. Waltz was only concerned with himself and possible later claims of ineffectiveness.

9. Once the court realized what had been filed the court should have returned the correspondence file unread and then investigated the attorney's unethical behavior and the conflict existing between counsel and client. Even if someone could make an argument that the attorney needed to document what was going on, the filing of this submission was not the appropriate way to accomplish that.

10. The fact that Mr. Hazlewood was not aware of what had happened is even more outrageous.

11. In conclusion it is difficult to imagine a scenario in which reading through such material would not influence a trial court judge, and it is also difficult for me to imagine that such disclosure did not somehow affect the outcome in this case.

Further the Declarant Sayeth not.

DECLARATION OF WALKER L. CHANDLER, ESQ.

I, Walker L. Chandler, Esq., declare under penalty of perjury as follows:

1. I am over eighteen years of age, and I have personal knowledge of the matters set forth herein.

2. I am an attorney licensed to practice law in the State of Georgia, the Eleventh Circuit Court of Appeals, and the U.S. Supreme Court.

3. I have practiced criminal law since 1975 and am a member of the Georgia Association of Defense Attorneys.

4. In 1997, the Supreme Court ruled in favor of myself and other candidates for political office who were forced under Georgia law to take a urine drug test, a case of first impression. The Supreme Court ruled that the candidate drug test Georgia devised diminished personal privacy for a symbol's sake; state action that is prohibited by the Fourth Amendment. Chandler, et al, v. Zell D. Miller, 520 U.S. 305 (1997).

5. I have received copies of the submission of James L. Waltz from my friend and colleague Nancy Lord who asked my opinion as to this submission labeled "ex parte motions to continue motion and trial date (not under seal) and the issuance of two subpena [sic] duces tecum and the early return of property (filed under seal)" that contained a summary of his dealings with his client and what appears to be all of his correspondence between himself and his client.

6. By his own admission, Mr. Waltz submitted his file for the sole purpose of "to ensure there is some record before the court regarding my difficulties with Mr. Hazlewood."

7. It is my opinion that the submission of this document by Mr. James L. Waltz was inappropriate as there were other ways he could have protected his own interests in his dealings with Mr. Hazlewood, such as providing a copy to a colleague or contacting the State Bar Ethics Department.

8. I have never heard of such a submission during my thirty years of practice in criminal law.

9. In my opinion, the District Court should not have read the document filed under seal unless and until such time as it held a hearing to unseal it so that Mr. Waltz could defend against a malpractice of ineffective assistance claim by Mr. Hazlewood.

10. It would appear that, as a result of this submission, the Court was made aware of some of Mr. Hazlewood's attorney's work product, including case strategies, witness interviews, theories and counter-theories, and was presented with extrajudicial information that cast the defendant in a negative light.

11. It appears from the materials I have reviewed involving sentencing, that the Court may have already been irritated by Mr. Hazlewood and this submission aggravated that negative impression.

12. In my opinion, both the filing, and the Court's apparent improper reading of it, were inherently prejudicial if the Court used it to guide its conduct of the case and sentencing.

13. As a member of the Bar, I hold the Attorney-Client privilege to be sacred and would not have made such a revelation had I been in the situation of Mr. Waltz, but would have merely kept a file for future use if necessary.

Further the Declarant Sayeth not.

DECLARATION OF MICHAEL MINNS, ESQ.

I, Michael Minns, Esq., declare under penalty of perjury as follows:

1. I am over eighteen years of age, and I have personal knowledge of the matters set forth herein.

2. I am an attorney licensed to practice law in the State of Texas and U.S. District Courts in all Circuits, and I have argued successfully before the Ninth Circuit.

3. I have practiced criminal law since 1977.

4. On August 10, 2002, at the request of the Ninth Circuit panel, I filed grievances against two former IRS attorneys, Mr. Sims and McWade both of whom were subsequently sanctioned by their State Bar, the Tax Court and the Director of Practice.

5. I have briefly reviewed the confidential material, apparently made available to a trial court and potentially public in which Mr. James L. Waltz chose to tell the Court, among other things, that "I am not trying to prejudice this court in any way." The mere fact that Mr. Waltz thinks to find it necessary that it is not his intention to prejudice his client should give a fifth grader some type of warning. That same fifth grader reading these obvious attorney client confidences would realize that something very sacred and very confidential has been shared, and this makes Mr. Waltz an excellent candidate for disbarment.

6. I am astounded that one the one hand, he would admit to filing this as a "counter-claim." Mr. Waltz is trying, in his own words to "for my protection against any counter claim of ineffectiveness, or threat of physical reprisal, or for purposes of rebutting some forthcoming lawsuit or Bar complaint, I want to ensure there is some record before the Court regarding my difficulties with Mr. Hazlewood."

7. In his own words he establishes a serious conflict of interest and one in which he anticipates an action against him, and therefore since he is anticipates a future action which may or may not occur, he has decided to dispense with his duties his client and promote his own future interests and protection. Waltz, knowing his severe conflict, tells the court he would like to continue to represent this man in spite of his "any counter claim" filed in his client's criminal action.

8. Waltz has become his client's adversary in a pending criminal action. I can certainly understand why Mr. Waltz is concerned about a Bar action because he has confessed to conflict of interest, and in spite of the conflict, and in spite of being ineffective (it is irrelevant whether his ineffectiveness is caused by himself or his client he can no longer go on).

9. I cannot think of a circumstance where a lawyer in anticipation of a problem with a client can make a filing such as this. Had a Bar Complaint been filed, he could have used it in defense.

10. The reason for this is he was too greedy to withdraw and wanted to profit from representing his now adversary.

Further the Declarant Sayeth not.

DECLARATION OF JEFFERY H. FRIEDMAN, ESQ.

I JEFFERY H. FRIEDMAN, hereby declare that:

1. I am an attorney duly licensed to practice law in the State of California.

2. I was certified to practice law in the State of California in 1972 and have practiced exclusively criminal law since January 29, 1973.

3. I was employed by the Orange County Public Defender's office from January of 1973 December of 1977. During that period of employment, I spent approximately 18 months assigned to the writs and appeals section of that office with my primary assignment consisting of the preparation of pretrial motions in felony cases and appeals in misdemeanor cases.

4. From 1978 until January of 1981 I was employed in the criminal law department of a 26 person law firm. My assignment was the preparation of felony and misdemeanor motions, writs, appeals and post-judgment litigation. I prepared virtually all of the motions for the criminal cases handled by the 10 person criminal law department of that firm save for routine matters.

5. From January 1981 until the present I have been engaged in the sole practice of criminal defense. A substantial portion of my practice has consisted of being associated in as second counsel to prepare and litigate motions in complex criminal matters handled by other attorneys. Additionally, cases are frequently referred to me by other criminal lawyers after conviction for purposes of my preparing and litigating motions for new trial, appeals, and other post-conviction avenues of relief.

6. I have personally researched, prepared and litigated motions in the trial court which ultimately became the bases for the reversals of the entire judgments in two capital cases -People v Alcala (1984) 36 Ca;. 3d 604 [motion to exclude prior acts] and People v Boyer (1989) 48 Cal 3d 247 [motion to suppress].

7. I have been published in the California Trial Lawyers Journal on the subject of complex criminal pretrial motion litigation.

8. I successfully defended Michael Goodwin when his charges two counts of murder and conspiracy for the 1988 Los Angeles County murder of Mickey Thompson and his wife, charged in Orange County in 2001, were dismissed for improper venue.

9. I have received copies of the submission of James L. Waltz disguised as "ex parte motions to continue motion and trial date (not under seal) and the issuance of two subpena [sic] duces tecum and the early return of property (filed under seal)" that contained a detailed declaration as to his dealings with his client and his entire file of privileged and attorney work product correspondence between himself and his client.

10. It is my opinion that the submission of this document by Mr. James L. Waltz, violated the ethical rules of attorney client privilege and work product.

11. The vast majority of letters of the defendant to his attorney were irrelevant to issue of getting relieved, just his disgust with attorney's performance. The matter could have been handled at an in camera hearing, which I was informed by Mr. Hazlewood's current attorney took place a few days later, where the defendant could simply explain his dissatisfaction.

12. Had Mr. Waltz truly believed that a judge needed to see this, the lawyer could go to a judge other than the trial judge.

13. In particular, the portions that were submitted as to the viability of the motion to suppress, absolutely irrelevant to issue of his being relieved. This portion, his belief

that the motion to suppress would probably be denied, should have gone to another judge.

14. Alternatively, he could have sanitized the letters by redacting those portions that expressed his belief in Appellant's guilt, the viability of the motion, trial strategy, witnesses, etc., and left in only those portions relating to the difficulties in communication between the attorney and client.

15. As a member of the Bar, I hold the Attorney-Client privilege to be sacred and would not have made such a revelation even under Court Order. Mr. Waltz' conduct violated the integrity of the legal profession and our system of justice.

Further the Declarant Sayeth not.

Dated January 31, 2005

DECLARATION OF LAURENCE LICHTER, ESQ.

I, Laurence Lichter, declare under penalty of perjury as follows:

I am over eighteen years of age, and I have personal knowledge of the matters set forth herein.

1. I am an attorney licensed to practice law in the State and Federal Courts of California.

2. I have received copies of the illegal submission of James L. Waltz disguised as "ex parte motions to continue motion and trial date (not under seal) and the issuance of two subpena [sic] duces tecum and the early return of property (filed under seal)" that contained a detailed declaration as to his dealings with his client and his entire file of privileged and attorney work product correspondence between himself and his client. A Certificate of Service to the government is attached to the filing.

3. It is my opinion that the submission of this document by Mr. James L. Waltz, now a Commissioner of the

Orange County Family Court and entrusted to make decisions about the lives of families, was an egregious violation of California Rules of Professional Conduct, Rule 3-100, not exempted by Rule 3-100 2(A) (informed consent of the client),(B)(believes the disclosure is necessary to prevent a criminal act that the member reasonably believes is likely to result in death of, or substantial bodily harm to, an individual) or (C)(to prevent a criminal act by the client).

4. By his own admission, Mr. Waltz submitted his file for the sole purpose of "to ensure there is some record before the court regarding my difficulties with Mr. Hazlewood."

5. As a result of this submission, the Court was made aware of Mr. Hazlewood's attorney's work product, including case strategies, witness interviews, theories and counter-theories, and was presented with extrajudicial information that cast the defendant in a negative light.

6. It is inconceivable that this submission did not prejudice the client during the proceedings of his case.

7. Upon receipt of this illegal filing, the proper action by the Court was to refuse to read it, and call a hearing to inform the Defendant of his Attorney's actions and determine whether the government had in fact received a copy as per the Certificate of Service attached to the document.

8. Once having read the submission that is unequivocally attorney client work product, which the Court does not deny, the Court could not have remained unbiased and should have recused itself.

9. A pervasive bias contaminated this entire case after this submission of the Attorney's entire client correspondence file to the District Court, Gary L. Taylor, without his client's knowledge, authorization, or even a service copy. According to his own Declaration, Mr. Hazlewood did not discover this until his habeas attorney began preparing his petition for a writ of habeas corpus, 28 USC § 2255. While the Certificate of Service to the government does not contain a checked off method of delivery, there was no

reason for a Certificate of Service at all had the submission been truly made ex parte. Mr. Hazlewood recalls statements and submissions by the government during the course of the proceedings demonstrate that it too may have received of this document.

10. The package contains much privileged material including theories of the case, witness interviews, legal strategies, and it cast the client in a negative light. It is my opinion that the District Court denied Mr. Hazlewood an evidentiary hearing on this and other valid issues and now has denied a Certificate of Appealability to avoid scrutiny of its own conduct.

11. After the file came to light during the preparation of a petition for collateral relief under 28 USCS § 2255, the District Court denied the petition without evidentiary hearing. These issues could have been explored in the interest of justice.

12. The denial by the same District Court to issue a Certificate of Appealability violated Mr. Hazlewood's substantive due process rights to scrutinize of the Court's actions by this Court of Appeals.

13. As a member of the Bar, I hold the Attorney-Client privilege to be sacred and would not have made such a revelation. Mr. Waltz' conduct violated the integrity of the legal profession and our system of justice. His actions, and those of the District Court in protecting him in that regard, should not go unremedied by this Honorable Court.

Further the Declarant Sayeth not.

DECLARATION OF EPHRAIM MARGOLIN, ESQ.

I, EPHRAIM MARGOLAN, ESQ., declare under penalty of perjury as follows:

1. I am over eighteen years of age, and I have personal knowledge of the matters set forth herein.

2. I was President of the National Association of Criminal Defense Lawyers in 1984, Founding President of Cali-

fornia Attorneys for Criminal Justice in 1973. I also served as President of the California Academy of Appellate Lawyers.

3. I have been a Criminal Defense Lawyer since 1964.

4. After twenty years of teaching a course on Advanced Criminal Law practice at the University of California Law School at Berkeley, I now teach Advanced Criminal Law Defense at the University of California, Hastings College of Law.

5. In addition to representing criminal defendants, I represent lawyers before the California Commission on Judicial Performance.

6. I have received copies of the submission of James L. Waltz, described as "ex parte motions to continue motion and trial date (not under seal) and the issuance of two subpoena [sic] duces tecum and the early return of property (filed under seal)", that contained a detailed declaration as to his dealings with his client and his entire file of privileged and attorney work product correspondence between himself and his client. I was provided with an oral explanation of the problem on which I was asked to file this declaration.

7. I believe that criminal defense lawyers owe undivided loyalty to their client. Filing before trial of sealed statements meant to protect the lawyer's representation against his client's potential criticism of the lawyer's performance, establishes a conflict of interest between a lawyer and his client. Keeping such communication secret from the client independently violates both the attorney's duty of loyalty to his client and his duty to refrain proceeding to trial with a conflict of interest.

8. Informing the trial judge of client strategy and client's secrets before the trial without client's approval establishes a conflict of interest between client and attorney and subverts the lawyer's loyalty to his client.

9. For a judge to keep such ex parte submissions secret from the defendant during the trial, (that the judge

received a statement from the lawyer in which client's secrets are revealed) violates the judges duty to maintains the appearance of fairness in the trial.

10. The above conduct [see 7, 8, 9] creates not only the appearance of impropriety and the potential for bias by the court but strongly suggests prejudice to the defendant.

11. Having received evidence suggesting conflict between the lawyer and his client, the court should have inquired into the conflict. Assuming that no such inquiry was conducted, the right of the client to fair trial and to independent counsel, were prejudiced.

12. There are other lesser steps the lawyer could have taken, for example: (1) lodging his "evidence" with a third party, (2) telling his client, after discussing the problems of conflict of interest, that client's secrets would be divulged to the trial judge and obtaining client's permission to do so.

Further the Declarant Sayeth not.

Dated: February 1, 2005 Ephraim Margolin, Esq.

DECLARATION OF DENNIS ROBERTS, ESQ.

I, Dennis Roberts, declare under penalty of perjury as follows:

1. I am over eighteen years of age, and I have personal knowledge of the matters set forth herein.

2. I am an attorney licensed to practice law in the State and Federal Courts of California.

3. I served as President of California Association of Defense Attorneys from 1981-1982 and served on its Board of Directors until 2003.

4. I have received copies of the illegal submission of James L. Waltz disguised as "ex parte motions to continue motion and trial date (not under seal) and the issuance of two subpena [sic] duces tecum and the early return of

property (filed under seal)" that contained a detailed declaration as to his dealings with his client and his entire file of privileged and attorney work product correspondence between himself and his client. A Certificate of Service to the government is attached to the filing.

5. It is my opinion that the submission of this document by Mr. James L. Waltz, now a Commissioner of the Orange County Family Court and entrusted to make decisions about the lives of families, was an egregious violation of California Rules of Professional Conduct, Rule 3-100, not exempted by Rule 3-100 2(A) (informed consent of the client),(B)(believes the disclosure is necessary to prevent a criminal act that the member reasonably believes is likely to result in death of, or substantial bodily harm to, an individual) or (C)(to prevent a criminal act by the client).

6. By his own admission, Mr. Waltz submitted his file for the sole purpose of "to ensure there is some record before the court regarding my difficulties with Mr. Hazlewood.

7. As a result of this submission, the Court was made aware of Mr. Hazlewood's' attorneys work product, including case strategies, witness interviews, theories and counter-theories, and was presented with extrajudicial information that cast the defendant in a negative light.

8. Upon receipt of this illegal filing, the proper action by the Court was to refuse to read it, and call a hearing to inform the Defendant of his Attorney's actions and determine whether the government had in fact received a copy as per the Certificate of Service attached to the document.

9. Once having read the submission, which the Court does not deny, the Court could not have remained unbiased and should have recused itself.

10. After the file came to light during the preparation of petition for collateral relief under 28 USCS § 2255, the District Court denied the petition without evidentiary hearing where this issue could have been explored.

11. The denial by the same District Court to issue a

Certificate of Appealability violated Mr. Hazlewood's substantive due process rights to scrutiny of the Court's own actions by this Court of Appeals.

12. As a member of the Bar, I hold the Attorney-Client privilege to be sacred and would not have made such a revelation even under Court Order. Mr. Waltz' conduct violated the integrity of the legal profession and our system of justice. His actions, and those of the District Court in protecting him in that regard, should not go without remedied by this Honorable Court.

Further the Declarant Sayeth not.

DECLARATION OF LINDA FRIEDMAN RAMIREZ, ESQ.

I, Linda Friedman Ramirez, declare under penalty of perjury as follows:

I am over eighteen years of age, and I have personal knowledge of the matters set forth herein.

1. I am an attorney licensed to practice law in the State and of Florida, the 11th and 9th Circuit Court of Appeals, and the US Supreme Court. I have served on the CJA panels of both Florida and Oregon, and was a provider to the Indigent Defense Services Division, State of Oregon from 1989-2000. While in Oregon, I represented at least 1000 defendant's as court appointed counsel in state and federal court.

2. I specialize in the representation of foreign nationals in criminal and civil matters and have developed my professional practice in the areas of federal and state criminal defense, post-conviction, wrongful death, and civil rights cases during my over twenty-four year career as an attorney.

3. My trial experience includes over sixty jury trials in federal and state court, and arguing before federal appellate courts. I have represented clients from various coun-

tries in Latin America, the Caribbean, Europe, and Africa.

4. I am is a member of the American Immigration Lawyers Association and works closely with immigration lawyers on issues raising immigration law consequences.

5. I speak Spanish, and have advocated for equal treatment of Hispanics in all aspects of the criminal justice system, particularly in the areas of pretrial release, and in immigration-related issues.

6. In the summer of 1998, I partnered with the Mexican Consulate in Portland in creating "Advice Regarding the Federal Crime of Illegal Reentry," a video in Spanish concerning immigration consequences for non-citizens pending state criminal court proceedings. This video, which was shown on a repeated basis by the Multnomah County Sheriff's office, was used to help educate defendants from Mexico and Central America regarding the immigration consequences of criminal convictions and the law of the federal criminal of illegal reentry.

7. On June 21, 2002, I received the Oregon Criminal Defense Lawyers Association President's Award for advocacy on behalf of Hispanics in Oregon.

8. I have worked extensively with communication barriers in the practice of criminal law and the proper way to handle these difficulties, and have co-authored numerous published articles including:

A. "The New Immigration Laws," Criminal Justice Magazine of the ABA Criminal Justice Section, (Co-Author with Capriotti, Kay and Unger), Summer 1998

B. "Language as a Barrier to Justice," Criminal Justice Magazine of the ABA Criminal Justice Section (Co-Author with Kay and Weber), Summer 1994

C. "Using Interpreters" (Chapter) "Cultural Issues in Criminal Defense" Juris Publishing Inc., 1999

D. "Representing the Non-English Speaking Client," The Champion, National Association of Criminal Defense Lawyers, 1994.

I. I have presented seminars on immigration issues in criminal law and representing the non-English speaking client, including:

A. Speaker,"The Non-English Speaking Client", "Celebrating a Decade of Defense", Washington Defender Association, Port Ludlow, Washington, April 23, 1994

B. Speaker "Representing the Non-English Speaking Client",Kona 2, Oregon Criminal Defense Lawyers Association, Kona, Hawaii, 1993

C. Presenter, "Understanding Issues of Civil Rights in Your Community", Oregon Chicano Concilio on Alcohol and Drug Abuse Conference, Salem, Oregon, 1993

D. Speaker, "Representing the Non-English Speaking Client", Law Education Institute/BNA 2nd Annual Criminal Law Update, Vail Colorado, 1993

E. Speaker, "Representing the Non-English Speaking Client", Law Education Institute/BNA 2nd Annual Criminal Law Update, Palm Springs, California, 1993

F. Speaker, "Effective Use of Interpreters", Judicial Education Program, Oregon State Bar, 1992

G. Speaker, "Striving for More Perfect Union: A Conference on Diversity in the Law", 1992

H. Speaker, "Differences in the Courtroom", District Court Judges Association, 1989

1. I am a member of the American Immigration Lawyers Association, Amnesty International, Criminal Justice Act Panel, Middle District, Florida, Florida Criminal Defense Lawyers Association, Florida State Bar, National Association of Criminal Defense Lawyers, National Immigration Project of the National Lawyers Guild, National Police Accountability Project of the National Lawyers Guild, the Legal Committee of NORML, Pinellas County Criminal Defense Lawyers Association, Pinellas County Trial Lawyers Association, St. Petersburg Bar Association, Co-Chair, International Law Section.

2. I have received copies of the submission of James L. Waltz captioned as "ex parte motions to continue motion and trial date (not under seal) and the issuance of two

subpena [sic] duces tecum and the early return of property (filed under seal)" that contained a detailed declaration as to his dealings with the defendant and his entire file of privileged and attorney work product correspondence between himself and his client.

3. I was shocked by the submission of this document by Mr. James L. Waltz. The Court on its own should have recognized that a conflict existed between the attorney and his client, by virtue of the attorney's statement that his actions in disclosing his entire file, with no exception, was to protect against some potential injury to himself.

4. It is also difficult for me to understand why the Court sua sponte did not return these materials to counsel, unread, admonishing the attorney.

5. I cannot imagine a situation in which a trial court judge would allow defense counsel to provide to the Court a complete copy of all attorney-client communications, and then read the communications without even informing the defendant and scheduling a hearing to address the issues raised by counsel's action. "I want to make some kind of record, for the purposes announced above. Toward that end, I have attached al the correspondence between counsel and Defendant; no exceptions." Again, counsel appears to be solely concerned for making a record rather than any harm that would come to the defendant by his submission of attorney-client correspondence.

6. I would specifically like to call attention to his statement that "...Defendant is my client and I will only defend him, subject to remaining honest and ethical. The fact is, however, I need the Court's assistance so I can provide effective representation. I need to create some record visa vie any future 2255 motion or complain (sic) against counsel." This clearly suggests that the defendant has asked counsel to defend him in some way that is not honest or ethical, and it is only common sense that this will have some influence on the trial court judge.

7. In my professional opinion, counsel's Declaration to the Court showed a shocking lack of concern with regard to prejudicing the trial court. "Mr. Hazelwood was very

difficult form the start: demanding, controlling and manipulative." In conclusion it is difficult to imagine a scenario in which reading through such material would not influence a trial court judge, and it is also difficult for me to imagine that such disclosure did not somehow affect the outcome in this case.

Further the Declarant Sayeth not.

Linda Friedman Ramirez, Esq.

Lamson & Looney, P.C.
Trial Lawyers
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Nancy Lord
1970 N. Leslie Road
No. 220
Pahrump, NV 89060 By Federal Express 1272-6814-2

RE: Hazlewood package

Dear Nancy:

The undersigned is an attorney licensed in the State of Texas, and before the Southern District of Texas, the Fifth and Sixth Circuit Courts of Appeals, and the United Slates Supreme Court. I have also appeared pro hue vice- in the courts of Michigan, Florida, Ohio and Tennessee, I am employed with the law firm of Lamson & Looney, P.C., in Houston. Texas. I am a shareholder in that firm, and in that position I am in charge of civil and criminal appeals, criminal pre-trial litigation, and all post-conviction work. The facts, as I understand it, are as follows:

1. Attorney Waltz was appointed to represent Mr. Hazelwood in Federal court.

2. Attorney Waltz found Mr. Hazlewood to be difficult to work with

3. Attorney Waltz, prior to Mr. Hazlewood making any legal claims of ineffective assistance of counsel, malpractice, or any ethical grievances against him, chose to take his file of confidential attorney/client correspondence and file it, under seal, with the Court.

4. There is a Certificate of Service attached to the filing. There is nothing, on the Certificate to indicate what exactly was served on the Government. Attorney Waltz and the prosecution claim only the Motion for Leave to File was served on the Government.

Having examined and discussed this matter, I have the following responses:

A. It was a plain breach of the attorney/client privilege to file the correspondence file with the Court, under seal or not. Regardless of who an individual was, unless that individual was retained to assist the Client, revealing this correspondence to them without the Client's express consent was a breach of the attorney/client privilege. The privilege is for the Client, not the attorney, to control. If the Client had filed a grievance, or alleged ineffective assistance in a post-conviction proceeding, the privilege would have been waived for those purposes. There is no ethical way to pre-file the privileged materials in order to fend off such an attack before it occurs. This is simply saying that because Mr. Waltz feared the client *may* waive the attorney client privilege at some point in the future, he would disclose the protected materials immediately. This simply cannot be justified. It seems to me that the materials were just as privileged against revelation to the Judge as to revelation to the Government. There is no question but that this was unethical.

B. No criminal defense attorney would consider it competent representation to file his client correspondence with the Court without the Client's having first waived the attorney/client privilege. A competent criminal defense attorney must understand the basic rules of client confidentiality, and would understand the importance of not divulging privileged discussions - whether those discus-

sions were conducted in person or in writing. That these letters included defensive strategies and theories only makes the unprofessional nature of these disclosures more blatant. In my view, disclosing these letters was plainly unprofessional representation sufficient to meet the first prong of *Strickland v. Washington*. It should be noted in this regard that nothing at all was redacted from this correspondence, even though the vast majority of the items covered in these letters had no bearing on the difficulties between the Client and Attorney Waltz. This failure to redact strategic discussions merely exacerbates the unavoidable unprofessional conduct Attorney Waltz committed by disclosing these documents; even his stated reason for the disclosure (imagining for the sake of argument that it could excuse disclosing anything) cannot justify the full extent of the disclosure.

C. It appears that Attorney Waltz, based on comments in Paragraph 49 of his Declaration, does not believe providing a trial court judge with privileged information is a breach of the attorney/client privilege. I emphatically disagree. Every human being on the planet who is not part of the defense team is covered by the attorney/client privilege. A judge is necessarily not part of the defense team. Client information cannot be divulged to janitorial staff, spouses, children, the Client's family, or even other criminal defense attorneys, without the consent of the Client, and for the purpose of preparing the Client's case. I have dealt with many difficult Clients. I have prepared packages of affidavits and other contemporary information in a separate file to use in the event that such Clients turned against this firm. Nobody in this firm has ever considered making a peremptory revelation of privileged information, however, before the Client acted in such a way as to terminate the attorney/client privilege, and nobody in this firm would ever believe it to be responsible or professional to do so.

D. The personal disagreements between Attorney Waltz and Mr. Hazlewood, as disclosed by Attorney Waltz, cast Mr. Hazelwood in a bad light and were unfairly prejudicial. Moreover, the letters were primarily written by Attor-

ney Waltz, and thus fail to accurately reflect both sides of the disagreement. This exacerbates the bad light Mr. Hazlewood was cast in, as he was given no fair opportunity to defend himself. It appears Attorney Waltz was able to write his letters to Mr. Hazlewood in a disingenuous and self-serving manner, with the foreknowledge that they would be sent to the Court. Mr. Hazlewood had no opportunity to fashion his statements for that audience as he had no idea where his letters–written solely to be read by his trail counsel–would end up. Finally, the fact that Mr. Hazlewood was not even made aware of this filing made it impossible for him to have responded to correct Attorney Waltz' self-serving statements. (This appears to reflect an additional ethical lapse on the part of Attorney Waltz, in that he failed to keep his Client adequately apprized of the course of proceedings when he filed this document without informing him. In light of the fact that Attorney Waltz informed the Client as to what at least appears to be every other filing, it appears that the omission of this unusual but critical filing was deliberate.) It is my understanding that several statements made by the judge reflect that he had read these documents, and apparently was led to view Mr. Hazlewood in the same light Attorney Waltz viewed him. This was plainly harmful to Mr. Hazlewood's defense.

E. The materials included defense theories and strategic discussions that were not only privileged but which would have been acutely sensitive. These matters were also likely to prejudice the Court (and, if also sent to the prosecution, would have fatally undermined their defensive value.) The discussions concerning standing issues, including discussions about how standing could be defeated as well as about how it could be established. These letters also included the first discussions of other ways in which the government could have obtained the same information they had seized in the contested searches and seizures. The trial court's comments prompting the government to consider inevitable discovery indicate that it had studied these portions of the correspondence, and was prepared to use Attorney Waltz' arguments against Mr. Hazlewood to assist the Government in defeating standing at the sup-

pression hearing. Furthermore, Attorney Waltz' letters appear to have given the trial court (and possibly the government) its first and best knowledge as to Mr. Hazlewood's gambling expenditures. All of this would have been highly prejudicial both at trial and at sentencing.

F. Attorney Waltz also questioned Mr. Hazlewood's competence in his letters. It is my understanding that the trial court judge later did the same and imposed a requirement that Mr. Hazlewood be evaluated and receive counseling. It would appear logical to conclude that this was a consequence of his reading Attorney Waltz' confidential letters. As this impression was formed from a self-serving set of documents prepared by Attorney Waltz, and as Mr. Hazlewood never had a chance to counter this information which he had no way of knowing Attorney Waltz had sent to the judge, this was very prejudicial.

G. In a situation such as this, it is very difficult to fathom out every instance of prejudice that occurred. The myriad of possible injuries to Mr. Hazlewood's case are too vast to explore. In so opening Pandora's Box, Attorney Waltz has opened the door to a vast array of potential prejudicial occurrences, both small and large. However, to my mind, the revelation of defensive theories, strategies, and positions, as well as revealing to the court harmful facts and opinions that would otherwise have remained privileged, render this action of Attorney Waltz so dangerous that any harm that can be identified with it is probably only the tip of a very large iceberg.

I hope this addresses your issues.

Sincerely,

Clay S. Conrad

APPENDIX G: ESSENTIAL PORTIONS OF TRIAL RECORD

Transcript Vol. 3, p. 26, l. 3-24, May 25, 1999

MR. HAZLEWOOD: No. My efforts are in accordance with trying to not have to do that at all.

THE COURT: All right. One additional thing. I don't want it to appear on the record that I'm agreeing with you on a point. You've said certain times that the papers you want or the information you want is in the prosecutors' hands and implying that you are somehow prevented from having that. The finding I've made is that there has been adequate discovery in this case and that the information that is in the government's hands has also been furnished to you through counsel.

MR. HAZLEWOOD: Your Honor –

THE COURT: I don't need an explanation from you of why it is you don't have that from your attorney or where it is. The point I'm trying to make is the court does not find that you've been deprived of that information. The court finds to the contrary, that that information has been furnished previously or has been made available.

MR. HAZLEWOOD: Okay All – all evidence received from the – from the government, your Honor, has been Bates stamped so it's all numbered and I'll be able to show that the items I'm requesting are not – have not been received by the defense.

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Vol 4, p. 16, l. 6-20, May 26, 1999

THE COURT: . . – it appears my fears were well-founded. What I'm concerned about is

that you are trying to induce error and make it appear in the record that your rights are being violated. You've stated just now that the ruling of the court yesterday has put you at some sort of a disadvantage because you can't take the action you wanted.

Now, let' be very clear as to what the ruling was yesterday, and I'm going to make a finding that your rights

are not, in my opinion and my observation, being violated here.

Yesterday at the conclusion of his testimony when you asked that he be subject to recall, I asked him to stay so that we could discuss this point before he left. And after the jury was excused and before he left, I explained to you that yesterday was the time for you to cross-examine if you wanted to cross examine him. [

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Vol. 4, p. 251, l. 22-25, May 26, 1999

THE COURT: All Right. Is there any additional, then, closing argument on the question

of the admissibility of these items of evidence? Just for the record, we're talking about Exhibits – nuts, I've lost it.

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p. 252, l. 1

MS. KAWAHARA: I believe it's 84 and 86 through 90, your Honor.

THE COURT: There was another one in addition to that.

MS. KAWAHARA: Oh, and 115.

THE COURT: Exhibits 85, 86-90, and 115. All right. Any additional comment on this? Let's begin with Mr. Hazlewood, you're the challenging party, any additional comment on it?

MR. HAZLEWOOD: Your Honor, I don't see that anything is really changed. We don't have any idea where they came from. We don't know when they arrived in the government's hands. We don't have any idea of their accuracy. We don't know how Mr. Cunnane's summaries are compiled fro these documents.

And the people that were brought in from the institutions that supposedly these documents came from testified that, number one, the first lady said that she wasn't even around or knew what the bank's practices were and, absent a letterhead, she couldn't really identify anything.

The second woman stated that she's never seen the original of these documents so she couldn't verify their authenticity as to the originals.

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p. 254, l. 5

[MS. KAWAHARA] And since Special Agent Cunnane has testified that his summaries

were obtained from bank records kept at the defendant's place of business plus these

particular records, the government submits that those – that both groups of records are admissible as required under 1006 and therefore the summaries should come in.

THE COURT: . . . .In the court's view, the items do satisfy that exception to the hearsay

rule and do qualify as business records under 803(6), and therefore I'll admit the records into

. . .

p. 255, l. 1

evidence as valid summaries under 1006

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p. 256, l. 9

[THE COURT] Finally, the court finds that rule 1006 has been complied with in the furnishing of the underlying documents and they've been made available for examination or copying. And the purpose for that provision is so that a defendant, if they want to, can have the opportunity to check it out and see if it's true or challenge it if it's not true.

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Vol. 5 p. 25, May 27, 1999

l. 14

MR. HUESTON: At this time, your Honor, the government would move to admit this summary chart into evidence.

THE COURT: Excuse me just a moment. What's the number again, please:

MR. HUESTON: 113

THE COURT: Is there objection?

MR. HAZLEWOOD: Yes, your Honor, fruit of the poisonous tree.

THE COURT: The objection for our record is the grounds that have already been discussed, correct, concerning other summary items?

MR. HAZLEWOOD: No objection on that grounds, your

. . .

Vol. 5, p. 26

l. 1

Honor, on those grounds.

THE COURT: The objection on the reserved grounds?

MR. HAZLEWOOD: On the reserved grounds, that's correct.

THE COURT: That doesn't need to be restated each time. All right. The objection is overruled, 113 is received.